
(2010) 08 OHC CK 0042

In the Orissa High Court

Case No : Writ Petition (C) No. 5214 of 2008

Damodar Mohanty and Others

APPELLANT

Vs

Upendra Bank.

RESPONDENT

Date of Decision : 03-08-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 32
Constitution of India, 1950 — Article 227

Citation : (2010) 110 CLT 740

Hon'ble Judges : Sanju Panda, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Sanju Panda, J.—In this Writ Petition, the Petitioners have challenged the Order Dated 10.4.2007 passed by the Learned Civil Judge (Senior Division), Bhadrak in Execution Case No. 39 of 2003 arising out of Title Suit No. 87 of 2000-I allowing the application filed by the Opp. Part/decreed-holder under Order 21 Rule 32 of the Code of Civil Procedure.

2. The facts, as reflected in the Writ Petition, are as follows: The Petitioners are the Judgment-debtors. Opp. Part as Plaintiff filed the aforesaid suit for permanent injunction in respect of Ka Schedule land which is prescribed as Khata No. 818, Plot No. 7604 an area of Ac. 0.04 decimals of Mouza-Bideipur, P.S.-Naikanidhi Diha. Dist.-Bhadrak. He had also given the sketch map of the said disputed plot in Schedule Kha. In the suit, the Defendants took a stand that the suit land connects the "Sarba Sadharana Rasta". KISSAM of the land remains in tact as "Danda". They stated that Plot Nos. 7603, 7605 & 7606 are homestead lands & the residential house of the Defendants & their uncles are situated adjacent to the suit land. The suit land is the only pathway for their movements as well as their uncles. Without use of the suit land, the ingress & egress to their house is unimaginable. They are using the suit land as their pathway for long time peacefully & continuously without any interruption. Plaintiff admitted

that the suit land is being used as Rasta & Defendants were stacking building materials in order to make pucca construction over the suit land for which the suit was filed. On the pleadings & the evidence adduced by the parties, the Trial Court on 30.11.2002 decreed the suit in part on contest with costs restraining the Defendants permanently from digging earth from the suit land in order to make pucca construction.

3. While the matter stood thus, since the Judgment-debtors were trying to raise construction over the suit land, the Plaintiff/ decree-holder filed the execution case along with an application under 21 Rule 32 of the Code of Civil Procedure. The Judgment-debtors appeared & filed their objection. After hearing both the sides & considering their respective evidence, the executing Court held that on 13.9.2003 the Judgment-debtors encroached a portion of the suit land & constructed house over the same in between 7 days from 13.8.2003. Accordingly, the said construction requires demolition in evicting Judgment-debtors at their cost for Judgment-debtors not obeying the permanent injunction issued against them in the original suit. The executing Court also directed for attachment of the immovable property as the cost had not been paid. Hence this Writ Petition.

4. Learned Counsel for the Petitioners submitted that during pendency of the execution case, the executing Court deputed a Civil Court commissioner to measure the disputed plot No. 7604. In the execution case, one of the Judgment-debtors was examined as OPW No. 1. In his cross-examination he categorically admitted that the suit land appertaining to Plot No. 7604 to the extent of Ac. 0.04 is Rasta. Their ancestral house is situated appertaining to Plot No. 7605. He also categorically denied that their house does not stand over the suit land. OPW No. 2 deposed that road in question exists over the suit land as it was existing earlier & the Judgment-debtors did not construct any new house & the road is free from all sort of encroachment. Further he failed to describe the length & width of the disputed land & the direction in which the suit house of the Judgment-debtors is situated. He was also not able to say which is the disputed land. While considering the objection of the Judgment-debtors regarding the report filed by the civil Court commissioner, the Court below rejected the report of the commissioner regarding measurement of the disputed land. Relying on the statement of the Judgment-debtors & decree-holder, the Court below came to the conclusion that the Judgment-debtors have encroached a portion of the suit land & the constructed house required demolition & eviction at their own costs as they did not obey the order of permanent injunction issued against them in the Judgment & decree passed in the suit. He submitted that without measuring the suit land the direction given by the executing Court to demolish the construction made over the suit land is illegal & the said order is liable to be set aside. He further submitted that as the civil Court commissioner did not measure a portion of the Defendants' house situated over the suit land, they will face inconvenience if the construction over the suit land would be demolished.

5. Learned Counsel for the Opp. Part/decreed-holder submitted that admittedly Plaintiff & Defendants in the suit contended that the disputed plot is 7604 having an area of Ac. 0.04 decimals. In the suit schedule, description of the land & the sketch map were given which is not disputed. Since the Court below has decreed the suit, any construction made by the Judgment-debtors over the suit land is liable to be removed. After the suit was decreed, the executing Court rightly passed the order for demolition of the construction made over the suit land. As there is no error apparent on the face of the impugned order, the impugned order need not be interfered with in exercise of the jurisdiction under Article 227 of the Constitution of India.

6. From the rival submissions of the parties & after looking into the impugned order, it appears that the executing Court rejected the commissioner's report as the commissioner did not measure the suit land as per the land measurement schedule since he had ignored some fixed point & did not use trijunction points available near the disputed land. However, from the Judgment & decree, it is crystal clear that the disputed land is Plot No. 7604. under Khata No. 818 & both the Judgment-debtors & the decree-holder were/ are using the same as Rasta which is a vacant plot. The suit has been decreed. The sketch map & the area are not disputed by the parties. Since the Defendants were permanently restrained from making any construction over the disputed land & the Court below after assessing the evidence adduced by the parties came to the conclusion that some new construction had been made within 7 days from 13.8.2003 after the decree was passed & the said construction is liable to be demolished, by the impugned order it issued a direction for demolition of the said construction. The stand taken by the Petitioners that a portion of their dwelling house is going to be demolished by virtue of the impugned order is an after-thought & is not to be accepted at this stage as the Judgment-debtors neither pleaded nor took a stand in the suit that a portion of their dwelling house is situated over the suit land. Therefore, this Court is not inclined to accept the said stand of the Petitioners.

7. Law is well settled that the executing Court will not go beyond the decree. Since the Judgment-debtors have not taken a stand anywhere in the Court below that a portion of their dwelling house is situated over the suit land, the said plea is not taken into consideration by this Court & this Court is of the view that the Court below has rightly issued a direction for demolition of the new construction over the disputed land as the suit was decreed & the Defendants were permanently restrained from making any construction over the disputed land except that they have a right to use the land as a path way. As the Judgment-debtors have not obeyed the order passed in the Judgment & decree, the same amounts to violation of the order of the Court below. Therefore, the Court below has rightly allowed the application of the Plaintiff.

8. Since there is no error apparent on the face of the impugned order, this Court is not inclined to interfere with the same.

Accordingly, the Writ Petition is dismissed. No Costs.